



**Federal Communications Commission
Washington, D.C. 20554**

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In Reply Refer to:

1800B3-RSS

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In re: **DKXOL(AM), Brigham City, UT**
File No. BR-20130603AMT
Facility ID No. 87107

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (Petition), filed on September 16, 2015, by Inca Communications, Inc. (Inca), former licensee of Station DKXOL(AM), Brigham City, Utah (the Station). The Petition seeks reconsideration of the Audio Division's (Division) August 17, 2015, letter decision,¹ which, after holding that the Station's license had automatically expired by operation of law, canceled the license, deleted the call sign, and dismissed as moot Inca's application for renewal of license (Renewal Application). For the reasons set forth below, we dismiss the Petition to the extent indicated herein, and deny it in all other respects.

Background. The Station ceased operations on November 20, 2013, and on November 26, 2013, Inca requested Special Temporary Authority (STA) to remain silent.² In the First STA Request, Inca explained that the Station had been experiencing signal interference and that it needed to temporarily suspend operations in order to investigate the cause. The staff granted Inca's First STA Request, by April 11, 2014, letter, authorizing the Station to remain silent until October 8, 2014.³ In the *STA Letter*, the staff expressly cautioned Inca that its license would expire by operation of law if the Station did not recommence operations within 12 months from the date it went silent, pursuant to the automatic expiration provision of Section 312(g) of the Communications Act of 1934, as amended (Act).⁴ On October 8, 2014, Inca requested an extension of its STA, citing unspecified severe health problems of Nicolas Vicente (Vicente), the Station's principal.⁵

On November 21, 2014, after 12 consecutive months of silence, the Station's license expired by operation of law. Thereafter, on March 23, 2015, the staff notified Inca that Commission records indicated that the Station's license had expired and that its call sign would be deleted unless it provided evidence of the Station's operation between November 20, 2013, and November 21, 2014.⁶ Inca provided

¹ See Ernest T. Sanchez, Esq., Letter Decision, Ref. 1800B3-AJR (MB Aug. 17, 2015) (*Letter Decision*).

² File No. BLSTA-20131126AAA (First STA Request).

³ Ernest T. Sanchez, Esq., Letter, Ref. 1800B3-DW (Apr. 11, 2014) (*STA Letter*).

⁴ *Id.*; See 47 U.S.C. § 312(g) (Section 312(g)). See also *Aerco Broad. Corp. v. FCC*, 51 F. App'x. 23 (D.C. Cir. 2002) (per curiam) (effect of Section 312(g) expiration is license forfeiture).

⁵ See File No. BLESTA-20141008AAX (Second STA Request).

⁶ Notification of License Expiration Letter from Peter H. Doyle, Chief, Audio Division, FCC Media Bureau, to Ernest T. Sanchez, Esq., counsel for Inca, Ref. No. 1800B3-KAW (Mar. 23, 2015) (*Notification*).

no evidence of the Station's operation during the subject dates, but filed a Resumption of Operations Form on April 6, 2015, in the Media Bureau's (Bureau) Consolidated Database System (CDBS), which stated that the Station had resumed operations on March 26, 2015.⁷ On April 22, 2015, Inca responded to the *Notification* via a self-styled petition for reconsideration in which it urged the Division to exercise its statutory discretion under Section 312(g) to reinstate the Station's license under the auspices of promoting "equity and fairness."⁸ Inca contended that: (1) circumstances beyond its control had made it impossible to maintain service; (2) it had acted diligently to restore service; (3) the Station had provided valuable and unique broadcast service for eight years; and (4) the Station's silence had been prolonged by the staff's inaction on Inca's Second STA Request.⁹

In the *Letter Decision* we dismissed the Response, finding that: (1) the Commission had never held determinative the illness of a licensee's principal in its decision to exercise reinstatement discretion, and found no basis in the record to do so for the first time in Inca's case;¹⁰ (2) Inca had not adequately demonstrated its diligence in restoring the Station's service during the relevant timeframe; (3) Inca had provided no authority to support reinstatement based on its eight-year provision of broadcast service; and (4) the purported staff inaction was not a valid justification for the Station's extended silence nor germane to its reinstatement request because it was Inca's responsibility to resume broadcast operations.¹¹ We also found unavailing Inca's attempt to distinguish its situation from cases in which the Commission declined to exercise its discretion under Section 312(g).¹² Accordingly, the staff modified CDBS to reflect the cancellation of the Station's license and deletion of its call sign, and dismissed the Renewal Application as moot.

On September 16, 2015, Inca filed the instant Petition and again requests that we exercise our discretion to reinstate the Station's license, advancing the same bases as before, and attempting to distinguish the cases cited in the *Letter Decision*. For example, Inca contends that it timely apprised the staff of Vicente's health problems, unlike the licensee in *New Visalia* that did not advance such reasons until one year after its license expired.¹³ Inca also asserts that other licensees received ample notice that their license would expire, but that it did not.¹⁴ Inca emphasizes Vincente's minority status, stating that he is among the few "[L]atino licensees that the Commission has long struggled...to encourage as broadcast licensees."¹⁵ Stressing its diligence relative to other licensees, and its view that this case does not implicate Section 312(g)'s objective to ensure that scarce spectrum does not lie fallow, Inca reiterates that factors beyond its control made it impossible to restore service.¹⁶

⁷ Resumption of Operations Form at 1.

⁸ Petition for Reconsideration at 1-6 (Response). Inca's Response to the *Notification* was incorrectly styled as a petition for reconsideration. As the *Notification* did not itself effect the expiration of the Station's license, but merely notified Inca of the presumptive expiration thereof, it did not constitute "an adverse ruling" subject to a petition for reconsideration under Section 1.106(a)(1). 47 CFR § 1.106(a)(1). The staff therefore considered the pleading as a "Response."

⁹ Response at 1-8.

¹⁰ *Letter Decision* at 3 (citing *New Visalia Broad., Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9744 (2014) (*New Visalia*)).

¹¹ *Id.* (citing *OCC Acquisitions, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 6147, 6150, para. 10 (2002) (*OCC Acquisitions*)).

¹² Section 312(g); *Letter Decision* at 4 (internal citations omitted).

¹³ Petition at 7 (citing *New Visalia*, 29 FCC Rcd at 9744).

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 5-6 (citing Section 312(g)).

¹⁶ Inca distinguishes its case from several cases where licensees have been dilatory in corresponding with the Commission. Petition at 4-6 (citing *Davina Sashkin*, Letter Order, 27 FCC Rcd 2920 (MB 2012); *Kirby Young*,

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the original order, or raises additional facts not known or existing at the time of petitioner's last opportunity to present them.¹⁷ A petition that fails to introduce relevant new facts or changed circumstances may be dismissed as repetitious.¹⁸ It is settled Commission policy that a petition for reconsideration is not to be used to reargue points already argued and rejected.¹⁹ Inca reasserts the same arguments that the staff earlier considered and rejected in the *Letter Decision*. As the Petition fails to show a material error or omission in the original decision and does not raise additional facts unknown or not existing until after the last opportunity to present them, it will be dismissed as repetitious.

Were we to consider the Petition's reasserted arguments in their slightly revised form, we would nonetheless deny the Petition. Section 312(g) of the Act provides that "if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary."²⁰ Inca acknowledges, and Commission records confirm, that the Station was silent from November 20, 2013, until March 26, 2015.²¹ Because the Station was silent for over 12 consecutive months, its license automatically expired on November 21, 2014, by operation of law without further Commission action. Section 312(g) grants the Commission discretion to extend or reinstate an expired license to "promote equity and fairness."²² Questions of equity and fairness are resolved by conducting a case-by-case analysis of the relevant facts.²³ This authority is exercised sparingly,²⁴ only in the rare circumstance where a station's extended silence is caused by compelling reasons that are beyond a licensee's control.²⁵ Nothing in the Petition suggests error in the *Letter Decision's* finding that the facts here do not warrant an exercise of discretion to reinstate Inca's license.

Letter Order, 23 FCC Rcd 35 (MB 2008); *ETC Commc'n, Inc.*, Letter Order, 25 FCC Rcd 10686 (MB 2010); *Zacarias Serrato*, Letter Order, 20 FCC Rcd 17232 (MB 2005)).

¹⁷ 47 CFR § 1.106. See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 3 (1964), *aff'd* *sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁸ See *Notices of Apparent Liability for Forfeitures of Emery Telephone*, Memorandum Opinion and Order, 15 FCC Rcd 7181, 7184, para. 5 (1999) (citing 47 CFR § 1.106(b)(3)). See also, e.g., *California Ass'n for Research & Educ., Inc. et al.*, Order on Reconsideration, 30 FCC Rcd 14915-16, para. 4 (2015); and see *Sagir, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 15967, 15974, para. 16 (2003).

¹⁹ See *Infinity Broad. Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 4216, para. 2 (2004); *S&L Teen Hospital Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900, para. 3 (2002).

²⁰ 47 U.S.C. §§ 312(g), 405; 47 CFR § 73.1740(c).

²¹ Petition at 3; Resumption of Operations Form at 1.

²² Section 312(g).

²³ See *Richard R. Zaragoza, Esq. et al.*, Letter Order, Ref. 1800B3-IB/ATS, at 4, n.31 (MB May 2, 2014) (citing *Eagle Broad. Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 600-01, para. 25 (2008) (*Eagle Broad.*), *aff'd sub nom.*, 563 F.3d 543 (D.C. Cir. 2009) ("[t]he Commission and its staff will determine on a case-by-case basis whether any purported equities associated with individual circumstances warrant reinstatement of a license forfeited pursuant to Section 312(g).")).

²⁴ The Commission has declined to reinstate broadcast licenses that have expired by operation of law where, *inter alia*, failure to resume operations was due to the licensee's own actions, finances, and/or business judgments. See, e.g., *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603 (2008) (not reinstating license where site loss was due to licensee's rule violations and continued silence was due to failure to complete construction at an alternate site); *OCC Acquisitions*, 17 FCC Rcd 6147 (not reinstating license and rejecting argument that staff inaction on STA requests was responsible for the failure to resume operations); *New Visalia*, 29 FCC Rcd 9744 (not reinstating license due to the alleged health problems of the licensee's principal).

²⁵ See, e.g., *V.I. Stereo Commc'n Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstating license where station's silence was attributable to destruction of towers in hurricane and substantial damage to

Contrary to its assertions, Inca's actions do not indicate diligence to restore service and thus do not provide a basis for reinstating the license. While Inca was initially granted authority to remain silent based upon its claim that it needed time to investigate the source of signal interference, it neither provided the results of that investigation, nor accounted for its inability to rectify the problem within 12 months. Furthermore, Inca filed the Second STA Request on October 8, 2014, the last day the Station had authorization to remain silent. We reject its argument that staff inaction on the Second STA Request was somehow responsible for Inca's failure to resume operations. It is well settled that, "the staff's inability to act on any application within a specific time cannot prevent license expiration nor give rise to any equitable claim that the license term should be extended."²⁶ It was Inca's responsibility to bring the Station back on the air, not the staff's responsibility to remind it to do so.²⁷ Moreover, irrespective of whether the staff had acted on the Second STA Request, its license would still have expired on exactly the same date because the staff's grant of STA does not supersede the automatic cancellation provision of Section 312(g).

Inca's claim that it was denied proper notice is similarly unfounded. The *STA Letter* explicitly stated, "[n]otwithstanding the grant of this [STA], the broadcast license for [the] Station [] will automatically expire as a matter of law if broadcast operations do not commence by 12:01 a.m., November 21, 2014."²⁸ The *Notification* provided likewise.

Neither Vicente's health problems nor his minority status constitute compelling reasons beyond Inca's control.²⁹ Vicente's health problems were not the original basis for the Station's silence, but asserted for the first time, without support, during the eleventh consecutive month of the Station's silence in Inca's Second STA Request.³⁰ With respect to Vicente's minority status, while the Commission strongly encourages minorities to become broadcast licensees, we find no basis in the statute or its legislative history to apply a more lenient reinstatement standard for minority-owned broadcast stations. Having re-examined the record, we find that the reasons advanced for the Station's extended silence do not constitute compelling reasons beyond Inca's control, nor do they create equities sufficient to warrant reinstatement of the Station's license.

Unauthorized Operations. We note that Inca filed the Resumption of Operations Form and has continued to operate the Station after its license automatically expired on November 21, 2014, and after the *Notification* explicitly informed Inca of this fact.³¹ Absent explicit Commission action reinstating an

rebuilt towers in additional hurricanes); *Harry Martin, Esq.*, Letter Order, 23 FCC Rcd 15012 (MB 2008) (reinstatement warranted where licensee took all steps needed to return to air from replacement site prior to 12 months of silence but nevertheless remained off air to promote air safety after diligently reporting that FCC and FAA records contained incorrect tower information for which it was not responsible); *Mark Chapman, Court-Appointed Agent*, Letter Order, 22 FCC Rcd 6578 (MB 2007) (reinstatement warranted where extended silence resulted from the licensee's compliance with a court order).

²⁶ *Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcast Stations*, Public Notice, 11 FCC Rcd 14356, para. 3 (1996).

²⁷ See, e.g., *Eagle Broad.*, 23 FCC Rcd at 595, para. 14 ("It is well-established that the licensee, not the Commission, is responsible for preventing cancellation of the station's license pursuant to Section 312(g) by resuming broadcasts on or before the one-year anniversary of the station's silence.").

²⁸ *STA Letter* (bold emphasis omitted).

²⁹ See *supra*, note 25.

³⁰ Second STA Request.

³¹ Resumption of Operations Form at 1; *Notification*. On May 9, 2016, the Commission's Enforcement Bureau, Denver Field Office staff visited the site from which the Station was last authorized to operate (approximate coordinates: 41° 18' 54" N, 112° 04' 43"). The staff determined that the Station was transmitting an unmodulated carrier signal on 1.660 kHz, essentially broadcasting a signal without programming.

expired license under Section 312(g),³² authority to operate a broadcast station automatically terminates after twelve consecutive months of silence.³³ Therefore, after Inca's Station license had expired, any subsequent broadcast operations were unauthorized and subject to enforcement action consisting of a monetary forfeiture with an upward adjustment, to the extent that the Station continued unauthorized operations.³⁴ We clarify that the mere filing of a petition for reconsideration does not itself reinstate a broadcast license that has expired pursuant to Section 312(g), nor does it give rise to any operating authority or permit a station to continue operations.³⁵ Likewise, the filing of a petition for reconsideration does not nullify the actions taken by the staff in the *Letter Decision* cancelling the Station's license, deleting the call sign, and dismissing the Renewal Application.³⁶ Accordingly, Inca must cease all Station operations immediately.³⁷ We defer initiation of an enforcement action against Inca at this time pending confirmation that the Station has discontinued broadcast operations.

Conclusion/Actions. For the reasons set forth above, the license for Station DKXOL(AM), Brigham City, Utah, HAS EXPIRED by operation of law on November 21, 2014, and all authority to operate Station DKXOL(AM), Brigham City, Utah, IS TERMINATED.

IT IS ORDERED that the Petition for Reconsideration filed on September 16, 2015, by Inca Communications, Inc., IS DISMISSED to the extent indicated herein, and DENIED in all other respects.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³² The discretionary provision of Section 312(g) states that the Commission "may extend or reinstate" a station license in certain limited circumstances (*i.e.*, prevailing in an administrative or judicial appeal, the applicable law changes, or to promote equity and fairness) (emphasis added).

³³ See *supra*, note 4.

³⁴ Section 301 of the Act provides that no person shall transmit radio signals except in accordance with authority granted by the Commission. 47 U.S.C. § 301. See also 47 CFR § 1.80, Section II (upward adjustment criteria include "egregious misconduct," "intentional violation," and "repeated or continuous violation").

³⁵ In situations when we choose to permit former licensees to continue broadcast operations pending the outcome of administrative or judicial appeal proceedings, we do so explicitly. See, e.g., *Contemporary Media, Inc.*, Decision, 13 FCC Rcd 14437, 14461, para. 45 (1998) (permitting licensee to continue operating for 90 days to "conclude the stations' affairs."). Cf. *Peninsula Commc'ns, Inc.*, Order to Show Cause, 17 FCC Rcd 2838, at 2843, n.10 (2002) (rejecting licensee's argument that continued unauthorized operations were permissible while its appeal remained pending, and stating, "when we choose to allow licensees to continue operations, we do so explicitly."). Here, we did not reinstate Inca's license, nor did we grant Inca permission to continue broadcast operations after its license expired for any reason. Consequently, all post-expiration operations are unauthorized.

³⁶ To the contrary, Section 1.102(b)(2) states that an action taken by designated authority is stayed *only* at the discretion of that designated authority. See 47 CFR § 1.102(b)(2) (if a petition for reconsideration of a non-hearing action is filed, the designated authority may in its discretion stay the effect of its action pending disposition of the petition for reconsideration). Here, the designated authority has not stayed the effectiveness of the *Letter Decision*. See, e.g., *U.S. v. Peninsula Comc'ns, Inc.*, 335 F.Supp.2d 1013, 1019 (D. Alaska 2004) (rejecting licensee's argument that Section 312(g) allows a licensee to continue operating a broadcast station after the license is cancelled or revoked during pendency of a lengthy appeal).

³⁷ We note that the filing of an application for review and/or a stay request also would not provide a basis for continuing or resuming Station operations. See 47 CFR § 1.102(b)(3) (Commission may in its discretion stay the effectiveness of an action taken pursuant to delegated authority).